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10 VICENTE MANUEL AGUIRRE  
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12 UNITED STATES DISTRICT COURT  
13  
14 SOUTHERN DISTRICT OF CALIFORNIA  
15

16 UNITED STATES OF AMERICA, ) CASE NO. 08CR2428 JAH  
17 )  
18 Plaintiff, )  
19 )  
20 v. ) REPLY TO GOVERNMENT'S  
21 ) RESPONSE AND OPPOSITION  
22 VICENTE MANUEL AGUIRRE, ) TO DEFENDANT'S MOTIONS  
23 )  
24 Defendant. )  
25 )  
26 ) DATE: August 25, 2008  
27 ) TIME: 8:30 a.m.  
28 )

Defendant submits the following Reply to the Government's Response and Opposition to Defendant's various motions ("Opposition").

I

MOTION FOR SEARCH AND

DISCLOSURE OF ELECTRONIC SURVEILLANCE

The Government's Opposition argues Defendant's motion for disclosure of electronic surveillance should be denied because he failed to establish standing since he hasn't shown he was intercepted or have a legitimate expectation of privacy where the interception took place. The Government makes this argument despite the admission of another Assistant U.S. Attorney that

REPLY

1 Defendant was in fact intercepted and that was the reason why he  
2 and his vehicle were intercepted and the vehicle searched.  
3 Although faced with a declaration directly quoting AUSA James  
4 Melendres that Defendant was intercepted and this was the reason  
5 his vehicle was stopped and searched, the Government's present  
6 lawyer simply ignores her co-counsel's admission. Moreover, the  
7 Government makes no attempt to submit a declaration from AUSA  
8 Melendres explaining whether 1) he made the statements, or, 2)  
9 if he made the statements, what was the context under which they  
10 were made, or, 3) which sources he relied upon when making the  
11 statements, or 4) why he was wrongly quoted, or 5) how he  
12 misunderstood what he was told.

13 The Government is silent on this matter other than the  
14 present Government attorney's disavowal she was not the source  
15 of the information. That goes without saying. Although it may  
16 be Defendant's burden to establish he was the subject of  
17 unlawful surveillance, it would seem that his burden is  
18 substantially lighter when a government prosecutor, in a  
19 position to know, admits the wiretap and the Defendant's  
20 involvement in it resulting in the stop and seizure. Such an  
21 admission is more than sufficient to establish standing, as  
22 opposed to a Defendant's declaration of what he believes may  
23 have occurred. A Government attorney is more in the know when  
24 wiretapping occurred than a Defendant would be, who  
25 understandably is not clued in while his communications are  
26 being intercepted. Government attorneys should be considered  
27 more reliable than other sources of information. Further, given  
28

1 the sophisticated means of modern interceptions, interceptees  
2 are more unobtrusively monitored than previously. The  
3 Government has established Defendant is an "aggrieved party."

4 A party claiming to be the victim of illegal electronic  
5 surveillance must first demonstrate that his interests were  
6 affected before the Government's obligation to affirm or deny is  
7 triggered. This "standing" requirement is met if a definite  
8 "claim" is made by an "aggrieved party" defined as "a party to  
9 any intercepted wire, oral, or electronic communication or a  
10 person against whom the interception is directed." Title 18  
11 U.S.C. § 2518(10)(a).

12 A "cognizable 'claim' need be no more than a 'mere  
13 assertion,' provided that it is a positive statement that  
14 illegal surveillance has taken place." *United States v. Apple*,  
15 915 F.2d 899, 905 (4<sup>th</sup> Cir. 1990).

16 Once the defendant makes such a showing, the Government must  
17 "affirm or deny" the occurrence of the alleged unlawful act. 18  
18 U.S.C. § 3504(a)(1).

19 Defendant has filed with this Reply his Declaration his  
20 possession and use of two cell phones. When he was arrested,  
21 Mr. Aguirre was in possession of one cell phone with a "push-to-  
22 talk" function. Aguirre Declaration, ¶ 4. Since the presently  
23 provided discovery does not even reflect the seizure of any  
24 phone, Mr. Aguirre is unable to further identify it. *Id.*  
25 However, Mr. Aguirre noted prior to his arrest that he  
26 experienced difficulties in using these phones, including the  
27 quality of the communications had deteriorated: "the calls would  
28

1 become scratchy and irregular with the volume going up and down.  
2 Some of the calls were cut off without explanation." *Id.*<sup>1</sup>

3 Mr. Aguirre's Declaration is sufficiently concrete and  
4 specific to make a *prima facie* showing that on the occasions  
5 described someone was interfering with his telephone calls and  
6 the Government was involved. *United States v. Alter*, 482 F.2d  
7 1016, 1027 (9<sup>th</sup> Cir. 1973). Defendant's proof is even more  
8 compelling when considered along with the Government  
9 prosecutor's admission that a wiretap led to Defendant's stop  
10 and search.

11 The Government must unequivocally affirm or affirm or deny  
12 the use of electronic surveillance. *United States v. Wylie*, 625  
13 F.2d 1371, 1375-76 (9<sup>th</sup> Cir. 1980). In *Wylie*, after the  
14 Government made a general denial defendant countered with a more  
15 detailed affidavit. This was sufficient for the court to order  
16 the Government to make a more specific search and disclosure.  
17 *Id.* Defendant Aguirre has gone beyond such a *prima facie*  
18 showing and cited the Government itself as proof of the  
19 unauthorized wiretap.

20 The Court should further be mindful that the wiretap in  
21 question may not be a federal but a state wiretap. If such is  
22 the case, the rules on standing are totally different. Under  
23 California Penal Code § 629.72, "Any person in any ...  
24 proceeding, may move to suppress some or all of the contents of  
25

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26 <sup>1</sup> Mr. Aguirre has submitted two Declarations; one is in  
27 English, the other in Spanish. The Spanish version is in Mr.  
28 Aguirre's native language and the English is an accurate  
translation.

1 any intercepted wire, electronic digital pager, or electronic  
2 cellular telephone communications, or evidence derived  
3 therefrom, only on the basis that the contents or evidence were  
4 obtained in violation of the Fourth Amendment ... or of this  
5 chapter.”<sup>2</sup> “Any person” under California law is a broader  
6 definition than “an aggrieved person.”

7 The federal Title III wiretap law established minimum  
8 standards for the admissibility of evidence obtained through  
9 electronic surveillance; state law cannot be less protective of  
10 privacy than the federal act. *People v. Otto*, 2 Cal.4th 1088,  
11 1098, 831 P.2d 1178 (1992). Since the federal act established  
12 minimum standards California was free to enact, and did, a more  
13 expansive rule on standing to protect the right to privacy in  
14 the state. Penal Code § 629.72, enacted in 1995, was passed by  
15 an overwhelming Senate vote of 92%, 28 to 2, and an overwhelming  
16 Assembly vote of 77.5%, 62 to 5.<sup>3</sup>

17 The Government in this case may be viewing a state wiretap  
18 conducted via a state wiretap law through a restrictive federal  
19 standing analysis. Under either analysis, however, Defendant  
20 has established his right to have the Government admit the  
21 unlawful wiretap so that the Court can order disclosure and  
22 discovery.

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24  
25 <sup>2</sup> “[T]his chapter” is Chapter 1.4 of the California Penal Code,  
26 which consists of §§ 629.50 et seq.

27 <sup>3</sup> Statutes 1995, chapter 971, section 10, page 5732; California  
28 Legislature, 1995-1996 Regular Session, Senate Final History, page  
703.

## II

## THE MOTIONS TO SUPPRESS

A. Motion to Suppress Statements.

The Government opposes Defendant's motion to suppress because he did not provide a declaration. Attached to this Reply is the requisite declaration adducing facts sufficient to establish his right to an evidentiary hearing on several grounds.<sup>4</sup>

First, Defendant was effectively arrested when he was stopped and he was not free to go, as his declaration states. This was not an investigatory or border stop but one based on the illegal wiretap. Statements obtained from a defendant after an illegal arrest are suppressed under the Fourth Amendment without regard to satisfying any "threshold" Fifth Amendment condition. Statements were obtained from the beginning from a person in custody. *Dunaway v. New York*, 442 U.S. 200, 216-219, 99 S.Ct. 2248, 2256-58 (1979).

Second, Defendant's statements were obtained in violation of *Miranda* as set forth in his declaration, including the statements made to the officers four hours later when he was told, prior to the video interview, that things would go better for him if he spoke to them. Mr. Aguirre was then taken into the room where he was interviewed; he did so after being told off camera that it would go better for him to be interviewed. On camera Mr. Aguirre stated, "As you wish." Aguirre Declaration, ¶ 3. This is a clear reference to what he was

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<sup>4</sup> The Aguirre Declaration appears smaller than in the original as it has undergone several facsimile transmissions.

1 instructed to do off camera. The entirety of Defendant's  
2 statements must be suppressed.

3 B. Motion to Suppress Vehicle Stop.

4 Defendant was stopped and arrested on the road. There is to  
5 date no evidence he was at the border when detained. The reason  
6 for the detention was the unlawful interceptions which caused  
7 him to be detained. After discovery is complete with the  
8 provision of the wiretap information the evidence must be  
9 suppressed.

10  
11 DATED: September 6, 2008

Respectfully submitted,

12  
13 S/ Philip A. DeMassa  
14 PHILIP A. DeMASSA  
15 Attorney for Defendant  
16 VICENTE MANUEL AGUIRRE  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. 08CR2428 JAH
	)	
Plaintiff,	)	DECLARATION OF VICENTE
v.	)	MANUEL AGUIRRE
	)	
VICENTE MANUEL AGUIRRE,	)	
	)	
Defendant.	)	

I HEREBY DECLARE:

1. I am the defendant in this case and make this declaration under the protections of *Simmons v. United States*, (1968) 390 U.S. 377, 88 S.Ct. 967.
2. I was stopped by a federal officer in Calexico as I was driving my vehicle at 5:00 p.m. on June 25, 2008. The officer asked for my identification, told me to get out of my car and said he was going to search my car. The officer prevented me from driving or retaining control of my car as I was immediately taken out of my car, told to turn around to face the car and put both hands on the car roof. I was then patted down by the officer and immediately escorted away. The officer immediately took control of my car without searching it first. I was immediately told to go to another area and put in a room separate from other people. I was in that room for a long period of time and was not told anything. I was

DECLARATION OF VICENTE MANUEL AGUIRRE

Sep 02 08 06:29p VICENTE & MANUEL AGUIRRE 760-342-2065 p.1



Sep 02 08 01:12p

Philip De Massa

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p.3

1           unable to make a telephone call or leave. After about  
2           an hour I was taken from one room and placed into a  
3           locked room. I was not given anything to drink or eat.  
4       3. Four hours later, just before 9:00 p.m., a federal  
5           officer, who I believe to be officer A. Zenteno, came  
6           into the closed room and told me they were going to  
7           interview me. Zenteno told me it would be better for  
8           me if I spoke to them and told them the truth. Zenteno  
9           did not advise me of my *Miranda* rights not to speak  
10          without an attorney being present, that anything I said  
11          could be used against me, and that I had a right to  
12          remain silent. Zenteno told me they were going to talk  
13          to me in another room and it would be better for me to  
14          speak to them. A few minutes later I was brought into  
15          another room and interviewed. About eighteen minutes  
16          into the interview the agents asked me if I wanted to  
17          talk. I said "as you wish." I was then asked to sign  
18          a form.  
19       4. I have learned that in the reports provided by the  
20          Government to my attorney there is no report that when  
21          I was arrested I possessed any telephone or cellular  
22          phone. At the time of my stop and arrest on June 25 I  
23          had either on my person or on the seat of my car a cell  
24          phone with a "push-to-talk" function. Because I have  
25          not been given any reports by the Government showing the  
26          seizure of the phone I cannot further describe it by  
27          make, model, serial number or cell number. Before my  
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DECLARATION OF VICENTE MANUEL AGUIRRE

-2-

p.2

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VICENTE M AGUIRRE

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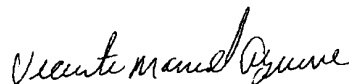
p.4

1 arrest I used that phone that day and a cell phone which  
2 I also used on numerous occasions and days. When using  
3 these phones I noticed that the calls would become  
4 scratchy and irregular with the volume going up and  
5 down. Some of the calls were cut off without  
6 explanation.

7 I declare under penalty of perjury under the laws of the  
8 State of California that the foregoing is true and correct.

9

10 Executed on September 3, 2008

  
VICENTE MANUEL AGUIRRE

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DECLARATION OF VICENTE MANUEL AGUIRRE

-3-

p.3

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VICENTE M. AGUIRRE

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Philip De Massa

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p.5

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3  
4 UNITED STATES OF AMERICA, )  
5 Plaintiff, )  
6 v. )  
7 VICENTE MANUEL AGUIRRE )  
8 Defendant. )  
9

CASE NO. 08CR2428 JAH

DECLARACION DE VICENTE MANUEL AGUIRRE

10 POR ESTE MEDIO DECLARO:

- 11 1. Yo soy el acusado en este caso y hago esta declaración bajo la protección de *Simmons*  
12 *v. United States, (1968) 390 U.S. 377, 88 S. Ct. 967.*
- 13 2. El 25 de Junio del 2008 a las 5:00 p.m. me paró un funcionario federal en Caléxico  
14 mientras yo manejaba mi vehículo. El funcionario me pidió mi identificación y me dijo  
15 que me bajara del carro y dijo que iba a revisar el vehículo. El funcionario previno de  
16 que yo manejara o que mantuviera control de mi carro ya que inmediatamente me bajó  
17 del carro y me pidió que me volteara hacia el carro, viendo de frente el carro y que  
18 colocara mis dos manos arriba del techo del carro. Después me revisó físicamente el  
19 funcionario y me escoltó a otro lugar. El funcionario inmediatamente tomó control de  
20 mi carro sin antes haberlo revisado. Me pidieron que me quedara en un área y fui  
21 llevado a un cuarto separado del resto de la gente. Estuve en ese cuarto por un largo  
22 periodo de tiempo y nunca se me dijo algo al respecto. No tuve la oportunidad de  
23 hacer una llamada telefónica o de irme. Después de una hora fui llevado de un cuarto  
24 a otro cuarto bajo llave. No se me dio nada de comer o de beber.
- 25 3. Cuatro horas después, antes de las 9:00 p.m., un funcionario federal, que creo yo que  
26 era el funcionario A. Zenteno entró al cuarto bajo llave y me dijo que yo iba a ser  
27  
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Sep 02 08 01:13p

Philip De Massa

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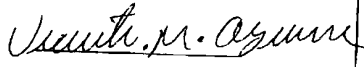
p.6

1 entrevistado. Zenteno me dijo que era mejor para mí que yo hablara con ellos y que  
2 hablara con la verdad. Zenteno no me advirtió de mis derechos de *Miranda* de no  
3 hablar sin que mi abogado estuviera presente, que todo lo que dijera podría ser usado  
4 en mi contra, y que tenía el derecho de permanecer callado. Zenteno me dijo que iban  
5 a hablar conmigo en otro cuarto y que era mejor para mí que yo hablara con ellos.  
6 Unos minutos después fui llevado a otro cuarto y me entrevistaron. Como a los  
7 dieciocho minutos de ser entrevistado los funcionarios me preguntaron que si quería  
8 hablar. Y yo contesté "como ustedes deseen." Después me pidieron que firmara una  
9 forma.

- 10 4. He aprendido que en los reportes que el Gobierno ha proveído a mi abogado, no hay  
11 ningún reporte que indique que cuando me arrestaron yo tenía en posesión algún  
12 teléfono o teléfono celular. En el momento que fui parado y arrestado, el 25 de Junio  
13 yo tenía conmigo o en el asiento del carro un teléfono celular con la función de  
14 "radio." Como no se me ha dado algún reporte de parte del Gobierno señalando que  
15 se confiscó mi teléfono no puedo describir el modelo, número serial, o el número  
16 telefónico. Ese día antes de mi arresto yo usé ese teléfono y otro teléfono celular que  
17 también usé en varias ocasiones y días. Cuando usaba estos teléfonos me di cuenta  
18 que las llamadas se escuchaban ruidosas e irregulares con el volumen, el volumen  
19 cambiaba de alto a bajo. Algunas de las llamadas se cortaban sin explicación.  
20

21 Yo declaro bajo la penalidad de juramento bajo las leyes del Estado de California que lo dicho es  
22 cierto y correcto.

23  
24 Ejecutado el 3 de Septiembre del 2008

25   
26 Vicente Manuel Aguirre  
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3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF CALIFORNIA

5 UNITED STATES OF AMERICA, ) CASE NO. 08CR2428 JAH  
6 )  
7 Plaintiff, ) CERTIFICATE OF SERVICE  
8 v. )  
9 VICENTE MANUEL AGUIRRE, )  
10 Defendant. )  
11

12 I HEREBY CERTIFY THAT:

13 I, PHILIP A. DeMASSA, am a citizen of the United States and  
14 am at least eighteen years of age. My business address is 2356  
Moore Street, Suite 201, San Diego, CA 92110.

15 I am not a party to the above-entitled action. I have caused  
16 service of the Reply and attached Declaration of Vicente Manuel  
Aguirre on the following parties by electronically filing the  
17 foregoing with the Clerk of the District Court using its ECF  
System which electronically notifies them:

- 18 1. Caroline P. Han, Esq  
Caroline.Han@usdoj.gov

19 I hereby certify that I have caused to be mailed the  
20 foregoing by the United States Postal Service, to the following  
non-ECF participant(s) in this case:

- 21 1. None

22 I declare under penalty of perjury under the laws of the  
23 State of California that the foregoing is true and correct.

24 Executed on September 6, 2008

25 s/Philip A. DeMassa  
PHILIP A. DeMASSA

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CERTIFICATE OF SERVICE